

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CRAIG SCHUB, et al.,) 1: 05-CV-00559-AWI-SMS
)
) FINDINGS AND RECOMMENDATION TO
) GRANT PLAINTIFF'S MOTION TO
) REMAND ACTION TO STATE COURT AND
ERNEST MERRILL, et al.,) FOR SANCTIONS (DOC. 5)
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Plaintiffs are proceeding with a civil action in this Court. A related action, Ernest Merrill, et al., v. County of Madera, et al, case number 1:05-CV-00195-AWI-SMS (related action), is also proceeding. The two matters were ordered related by Judge Coyle on June 28, 2005, in the present action, action number 1:05-CV-00559-AWI-SMS, and this action was reassigned to the undersigned Magistrate Judge. The matters have been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302 and 72-304. Pending before the Court is Plaintiff's motion to remand action number 1:05-CV-00559-AWI-SMS.

I. Background

On April 26, 2005, Defendants removed the instant action from the Madera County Superior Court, filing a notice of

1 removal. The complaint attached thereto (Exh. 1) was filed by
2 Plaintiffs Craig Schub and Michelle Gillette, residents of Orange
3 County, California, and owners of property that they purchased
4 from Defendants in February 2003 in order to build a home and run
5 a cattle operation thereon. (Id. at 1.) Defendants have an
6 easement over Plaintiffs' property to use for a road into
7 Defendants' adjoining property to facilitate residential and
8 business activities on the property. Defendants are Ernest
9 Merrill, an individual allegedly residing in Madera County,
10 California, and his wife, Defendant Lila Merrill; Ernest Merrill
11 was further alleged to be the president, shareholder, and alter
12 ego of Defendants Dream Catcher Ranch, Inc. (DC) and Little Butte
13 Cattle Company (LB), which were alleged to be purported to be
14 Nevada corporations.

15 The claims stated were as follows: (1) Breach of Easement
16 Agreement (failure to comply with terms of a written easement by
17 engaging in unlawful, wrongful and dangerous grading of a road
18 being built on Plaintiffs' property, improper use of the
19 easement, and leaving debris); (2) Specific Performance; (3)
20 Preliminary and Permanent Injunction; (4) Abatement of Nuisance
21 (caused by the aforementioned conduct and by failing to comply
22 with governmental regulations, which in turn caused the County of
23 Madera to "red tag" the property and thereby to prevent
24 Plaintiffs from using the roadway to serve their own property and
25 from developing their own property); (5) Trespass; (6)
26 Declaratory Relief (regarding the scope of the easement); (7)
27 Termination of Easement; (8) Negligence (breach of duty created
28 by regulations and law promulgated by Madera County, California

1 Department of Fish and Game, and other governmental agencies);
2 and (9) Fraud (misrepresentation by Defendants at the time of
3 purchase regarding Plaintiffs' property being buildable, gated,
4 fenced, and secure).

5 In the body of the notice of removal, Defendants requested
6 that the Court take judicial notice of all documents filed in the
7 related action. They explained that in the related action, the
8 Plaintiffs were the Merrills (Defendants here), who alleged that
9 the County of Madera and other county-related defendants violated
10 Plaintiffs' constitutional rights to be free from illegal
11 interference with their right to contract pursuant to the United
12 States Constitution, Art. I, § 10 (concerning the agreement
13 between Schub/Gillette and the Merrills pursuant to which the
14 Merrills are contractually obligated to complete grading and
15 maintenance of the road over the Schub's property); to due
16 process of law and to protection from unlawful takings of
17 property, and to protections under the commerce clause and the
18 First Amendment. In the related action, the Merrills asserted
19 that the County of Madera wrongfully cancelled and/or refused the
20 Merrills' applications for permits to grade the road, and that
21 this refusal was based on the private purposes of the wife of
22 Gary Gilbert, who is a defendant in the related action, a
23 neighbor who did not want the property developed, and a Madera
24 County Supervisor.

25 In the body of the notice of removal in the instant case,
26 Defendants Merrill assert that the transaction or occurrence that
27 forms the basis of the related action is the same as that which
28 forms the basis of the present action. In the last sentence of

1 the notice of removal, Defendants ask the Court to join in this
2 action the parties in the related action.

3 Defendants subsequently filed on May 23, 2005, in this
4 action a motion to consolidate the two actions, to implead third
5 party defendants (the County of Madera, Madera County Supervisor
6 Gary Gilbert, and Madera County Planning Department employees
7 Angela Basch and Mark Meyers); and to consolidate and join the
8 parties in this case into case number CIV-F-05-0195 AWI SMS. A
9 similar motion has been filed in the related case. These motions
10 are not presently set for hearing.

11 On May 10, 2005, Plaintiffs filed a motion to remand and for
12 sanctions. On May 23, 2005, a response to the motion was filed by
13 Defendants. On June 6, 2005, a reply to the response was filed.
14 On June 10, 2005, the hearing on the motion to remand and for
15 sanctions was vacated pending the order relating cases. The Court
16 on its own motion has set the motion for hearing. Subsequently
17 the Court vacated the hearing because the matter was deemed
18 suitable for decision without oral argument. On August 9, 2005,
19 the matter was ordered submitted to the Court for consideration
20 and for preparation of findings and recommendations by the
21 Magistrate Judge and for decision by the District Judge after the
22 passage of an appropriate time for the filing of objections and
23 any reply thereto.

24 II. Jurisdiction of the Magistrate Judge

25 Title 28 U.S.C. § 636(b) provides in pertinent part:

- 26 (1) Notwithstanding any provision of law to the contrary--
27 (A) a judge may designate a magistrate to hear
28 and determine any pretrial matter pending before
the court, except a motion for injunctive relief,
for judgment on the pleadings, for summary judgment,

1 to dismiss or quash an indictment or information
2 made by the defendant, to suppress evidence in a
3 criminal case, to dismiss or to permit maintenance
4 of a class action, to dismiss for failure to state
5 a claim upon which relief may be granted, and to
6 involuntarily dismiss an action. A judge of the
7 court may reconsider any pretrial matter under
8 this subparagraph (A) where it has been shown that
9 the magistrate's order is clearly erroneous or
10 contrary to law.

11 (B) a judge may also designate a magistrate to
12 conduct hearings, including evidentiary hearings,
13 and to submit to a judge of the court proposed
14 findings of fact and recommendations for the
15 disposition, by a judge of the court, of any
16 motion excepted in subparagraph (A), of applications
17 for posttrial relief made by individuals convicted
18 of criminal offenses and of prisoner petitions
19 challenging conditions of confinement.

20 Fed. R. Civ. P. 72 provides in pertinent part:

21 (a) **Nondispositive Matters.** A magistrate judge to whom
22 a pretrial matter not dispositive of a claim or defense
23 of a party is referred to hear and determine shall
24 promptly conduct such proceedings as are required and
25 when appropriate enter into the record a written
26 order setting forth the disposition of the matter.
27 Within 10 days after being served with a copy of
28 the magistrate judge's order, a party may serve and
file objections to the order; a party may not
thereafter assign as error a defect in the magistrate
judge's order to which objection was not timely made.
The district judge to whom the case is assigned shall
consider such objections and shall modify or set aside
any portion of the magistrate judge's order found to
be clearly erroneous or contrary to law.

(b) **Dispositive Motions and Prisoner Petitions.** A
magistrate judge assigned without consent of the
parties to hear a pretrial matter dispositive of a
claim or defense of a party or a prisoner petition
challenging the conditions of confinement shall
promptly conduct such proceedings as are required.
A record shall be made of all evidentiary proceedings
before the magistrate judge, and a record may be made
of such other proceedings as the magistrate judge
deems necessary. The magistrate judge shall enter
into the record a recommendation for disposition
of the matter, including proposed findings of fact
when appropriate. The clerk shall forthwith mail
copies to all parties.

The question presented is whether a motion to remand a

1 proceeding to state court is a nondispositive motion that a
2 magistrate judge can determine, or a dispositive motion that a
3 district judge must determine so that a magistrate judge may only
4 issue findings and recommendations. Some of the circuit courts of
5 appeals have held that motions to remand are dispositive, and
6 thus a magistrate judge does not have jurisdiction to determine
7 such a motion. The reasoning is that although such motions are
8 not enumerated in § 636(b)(1)(A), they nevertheless are
9 functionally the equivalent of a motion for involuntary dismissal
10 because they determine that there will not be a federal forum
11 available to entertain a particular dispute. Vogel v. U.S. Office
12 Products Co., 258 F.3d 509, 514-17 (6th Cir. 2001) (noting a lack
13 of decisions from other circuits); First Union Mortgage Corp. v.
14 Smith, 229 F.3d 992, 994-97 (10th Cir. 2000); In re U.S.
15 Healthcare, 159 F.3d 142, 145-46 (3d Cir. 1998). The Ninth
16 Circuit Court of Appeals has not taken a position on whether or
17 not a Magistrate Judge can rule on a motion to remand an action
18 to state court. Some district courts have taken the position that
19 a motion to remand is not dispositive and thus may be determined
20 by a magistrate judge. See Bearden v. PNS Stores, Inc., 894 F.
21 Supp. 1418, 1419 n. 1 (D. Nev. 1995). The present motion involves
22 a determination of subject matter jurisdiction and, if granted,
23 will terminate the availability of a federal forum. In an
24 abundance of caution, the Magistrate Judge will thus proceed by
25 way of findings and recommendations.

26 III. Analysis

27 A. Title 28 U.S.C. § 1447(c) provides:

28 A motion to remand the case on the basis of any defect

1 other than subject matter jurisdiction must be made
2 within 30 days after the filing of the notice of
3 removal under section 1446(a). If at any time before
4 final judgment it appears that the district court lacks
5 subject matter jurisdiction, the case shall be remanded.
6 An order remanding the case may require payment of
7 just costs and any actual expenses, including
8 attorney fees, incurred as a result of the removal.
9 A certified copy of the order of remand shall be
10 mailed by the clerk to the clerk to the clerk of
11 the State court. The State court may thereupon proceed
12 with the case (emphasis added).

13 Plaintiffs are alleging a lack of subject matter
14 jurisdiction; thus, their motion is thus timely because it was
15 made before final judgment.

16 B. General Principles of Removal and Remand

17 Title 28 U.S.C. § 1441 provides:

18 (a) Except as otherwise expressly provided by Act of
19 Congress, any civil action brought in a State court
20 of which the district courts of the United States
21 have original jurisdiction, may be removed by the
22 defendant or the defendants, to the district court
23 of the United States for the district and division
24 embracing the place where such action is pending.
25 For purposes of removal under this chapter, the
26 citizenship of defendants sued under fictitious
27 names shall be disregarded.

28 (b) Any civil action of which the district courts have
original jurisdiction founded on a claim or right
arising under the constitution, treaties or laws
of the United States shall be removable without
regard to the citizenship or residence of the parties.
Any other such action shall be removable only if none
of the parties in interest properly joined and served
as defendants is a citizen of the State in which such
action is brought.

Thus, only state court actions that originally could have been
filed in federal court may be removed to federal court by the
defendant; otherwise, federal question jurisdiction is required.
Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). The time
for testing federal question jurisdiction is the time of removal.

1 Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320,
2 326-27 (5th Cir. 1998).

3 The statute regarding removal is strictly construed against
4 removal jurisdiction, and federal jurisdiction must be rejected
5 if there is any doubt as to the right of removal; the removing
6 defendant bears the burden of establishing that removal is proper
7 by proving facts sufficient to establish jurisdiction by a
8 preponderance of the evidence. Gaus v. Miles, Inc., 980 F.2d 564,
9 566-67 (9th Cir. 1992); Sanchez v. Monumental Life Ins. Co., 95
10 F.3d 856, 861-62 (9th Cir. 1996).

11 C. Determination of Jurisdiction

12 In their opposition to the motion to remand, Defendants do
13 not argue that this Court originally had jurisdiction. Instead,
14 they argue that the Court should consolidate the two actions
15 pending in this Court and should implead the County of Madera and
16 its employees. However, § 1441 permits removal only of a civil
17 action brought in a state court of which the district courts of
18 the United States have original jurisdiction. Jurisdiction is a
19 measure of judicial power; if the Court lacked jurisdiction at
20 the time of removal, then given the lodging of Plaintiff's
21 objection to removal jurisdiction, the Court is not empowered at
22 this point to order consolidation or joinder because absent
23 removal jurisdiction, it lacks the power to make orders affecting
24 the procedural or substantive aspects of the case. See Stock West
25 Corp. v. Taylor, 964 F.2d 912, 917 (9th Cir. 1992) (holding that
26 in the absence of jurisdiction (there diversity) at the time of
27 removal, the Court later lacked the power to enter an abstention
28 order or to rule on the merits of an immunity defense).

1 The determination of subject matter jurisdiction for the
2 purposes of this motion to remand must be made on the basis of
3 the facts as they existed as of the time the notice of removal
4 was filed. Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939)
5 (diversity, separable controversy, jurisdiction to be determined
6 at the time of the filing of the petition for removal, and not on
7 the basis of a later-filed amended complaint). The presence of a
8 counterclaim which the defendant may raise will not create
9 diversity jurisdiction because in the absence of a specific
10 statutory exception, a federal court can exercise removal
11 jurisdiction over a case only if it would have had jurisdiction
12 over it as originally brought by the plaintiff. See Snow v. Ford
13 Motor Co., 561 F.2d 787, 789 (9th Cir. 1977) (amount in
14 controversy).

15 Further, it is established that to the extent that subject
16 matter jurisdiction is based on federal question jurisdiction,
17 the issue is governed by "well pleaded complaint rule," whereby
18 in the absence of jurisdiction based on diversity of citizenship,
19 and further assuming that there is not complete federal
20 preemption, federal jurisdiction exists only if a federal
21 question is affirmatively and distinctly presented on the fact of
22 the plaintiff's properly pleaded complaint. Caterpillar, Inc. v.
23 Williams, 482 U.S. 386, 392 (1987); Westinghouse Electric Corp.
24 v. Newman & Holtzinger, P.C., 992 F.2d 932, 934, 937 (9th Cir.
25 1993). Defendant may not inject a federal element not pleaded in
26 order to create federal question jurisdiction; a right or
27 immunity created by the Constitution or laws of the United States
28 must be an essential element of the plaintiff's cause of action.

1 Franchise Tax Board v. Construction Laborers Vacation Trust, 463
2 U.S. 1, 11 (1983); Caterpillar, Inc. v. Williams, 482 U.S. at
3 399; Karambelas v. Hughes Aircraft Co., 992 F.2d 971, 974-75 (9th
4 Cir. 1993). Federal question jurisdiction may not be created by
5 the presence of a federal defense. Franchise Tax Board v.
6 Construction Laborers Vacation Trust, 463 U.S. at 10-12.

7 Further, the fact that there may be a related action brought
8 by the Defendants in this action that might involve a federal
9 question does not render this action, which is pleaded as an
10 action involving only state-law claims, one within the subject
11 matter jurisdiction of this Court. Section 1441 requires that the
12 district court have original jurisdiction over an action before
13 it may be removed pursuant to § 1441. Syngenta Crop Protection,
14 Inc. v. Henson, 537 U.S. 28, 34 (2002) (holding that ancillary
15 jurisdiction over a controversy does not provide the original
16 jurisdiction required for removal under § 1441). The existence of
17 the other action does not confer original jurisdiction over the
18 instant action. Absent a subsequent decision on the merits, a
19 post-removal amendment that adds a valid federal claim does not
20 cure lack of removal jurisdiction at the time of removal. Libhart
21 v. Santa Monica Dairy Co., 592 F.2d 1062, 1065 (9th Cir. 1979).
22 A fortiori, Defendants' mere assertion of a desire to consolidate
23 the cases or to amend pleadings to include parties involved in
24 the other case does not suffice to render this action removable
25 at the time the notice of removal was filed. In the present case,
26 Plaintiffs, who filed the motion to remand within fifteen days of
27 the date of removal, have timely objected to the removal. This is
28 not a case in which the Defendants validly asserted a federal

1 counterclaim to which the Plaintiffs failed to object before the
2 case proceeded to a decision on the merits.

3 D. Asserted Bases of Jurisdiction

4 Applying the principles set forth above, the asserted bases
5 of jurisdiction must be reviewed. In the notice of removal,
6 Defendants asserted that the Court had jurisdiction pursuant to
7 28 U.S.C. §§ 1331, 1332, 1335, 1367(a), 1397, 1441(a) through
8 (c), and 1446.

9 Title 28 U.S.C. § 1331 provides that district courts shall
10 have original jurisdiction of all civil actions arising under the
11 Constitution, laws, or treaties of the United States. Section
12 1441 provides that any civil action of which the district courts
13 have original jurisdiction founded on a claim or right arising
14 under the Constitution, treaties, or laws of the United States
15 shall be removable without regard to the citizenship or residence
16 of the parties. A claim arises under federal law if federal law
17 creates the claim or if the plaintiff's right to relief
18 necessarily depends on resolution of a substantial question of
19 federal law. Franchise Tax Board v. Construction Laborers Vacation
20 Trust, 463 U.S. 1, 27-28 (1983). The complaint contains no claim
21 arising under the Constitution, laws, or treaties of the United
22 States. Thus, this Court has no federal question jurisdiction
23 over the instant action.

24 Title 28 U.S.C. § 1332(a)(1) provides that the district
25 courts shall have original jurisdiction of all civil actions
26 where the matter in controversy exceeds the sum or value of
27 \$75,000, exclusive of interest and costs, and is between citizens
28 of different states. It is the burden of the defendants to allege

1 the jurisdictional facts necessary for diversity jurisdiction.
2 Gaus v. Miles, 980 F.2d 564, 566 (9th Cir. 1992). For diversity
3 purposes, a person is a citizen of the state in which the person
4 is domiciled; a domicile is defined to include physical presence
5 at a given location of residence coupled with an intent to remain
6 there indefinitely. Lew v. Moss, 797 F.2d 747, 749 (9th Cir.
7 1986).

8 Here, the complaint alleges that Plaintiffs and Defendant
9 Ernest Merrill are residents of Madera County, California, and
10 that they use the same address as the DC and LB enterprises in
11 Madera County. Taking judicial notice of the unverified complaint
12 in the related action,¹ the Merrills there allege that in 2002
13 they purchased a mobile home to place on their property in Madera
14 County, they sought to put a deck on that home, and that they
15 intend to make that property their permanent residence. (Complt.
16 at 2, 5 ,9.) The Defendants have not alleged or supplied facts
17 showing that they are domiciled in a state other than California.

18 Thus, Defendants have not shown subject matter jurisdiction
19 based on diversity of citizenship pursuant to § 1332.

20 Likewise, Defendants have not shown subject matter
21 jurisdiction based on 28 U.S.C. § 1335, which provides for
22 jurisdiction in district courts of civil actions that involve
23 claimants of diverse citizenship "as defined in section 1332,"
24 and that are actions of interpleader or in the nature of
25 interpleader, which involves adverse claimants to a single
26

27 ¹ Defendants' request that the Court take judicial notice of the pleadings in the related action is granted in
28 part; the Court takes notice of the complaint and of the docket in the related case. United States ex. rel. Robinson
Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992).

1 instrument or piece of property that is deposited with the Court.
2 There is neither diverse citizenship nor interpleader involved in
3 this case.

4 There is no jurisdiction shown pursuant to § 1367(a), which
5 provides in pertinent part that in any civil action of which the
6 district courts have original jurisdiction, the district courts
7 shall have supplemental jurisdiction over all other claims that
8 are so related to claims in the action within such original
9 jurisdiction that they form part of the same case or controversy
10 under Article III of the United States Constitution. The problem,
11 as previously set forth, is that in the present action, no
12 original jurisdiction has been established.

13 Defendants have not established jurisdiction pursuant to 28
14 U.S.C. § 1397, which provides that a civil action of interpleader
15 or in the nature of interpleader under § 1335 may be brought in
16 the district in which one or more claimants resides. As
17 previously noted, this is not an action under § 1335.

18 Likewise, Defendants have not established jurisdiction
19 pursuant to the removal statutes. Title 28 U.S.C. § 1441(c)
20 provides:

21 Whenever a separate and independent claim or cause of
22 action within the jurisdiction conferred by section
23 1331 of this title is joined with one or more otherwise
24 non-removable claims or causes of action, the entire
25 case may be removed and the district court may
26 determine all issues therein, or, in its discretion,
27 may remand all matters in which State law predominates.

28 As previously discussed, within this action there is joined no
separate and independent claim or cause of action within the
jurisdiction conferred by § 1331. Thus, § 1441 does not confer
jurisdiction.

1 Likewise, § 1446 deals exclusively with the procedural
2 mechanism for removal; it is not a basis of jurisdiction.

3 In summary, Defendants have not demonstrated that this Court
4 had subject matter jurisdiction over the instant action at the
5 time of removal. Thus, Plaintiffs' motion to remand the action to
6 state court should be granted.

7 IV. Attorney's Fees

8 An order remanding a case may require payment of just costs
9 and any actual expenses, including attorney fees, incurred as a
10 result of the removal. 28 U.S.C. § 1447(c). An award of fees is
11 in the Court's discretion and may be made in the absence of a
12 finding that a party proceeded in bad faith, Moore v. Permanente
13 Medical Group, Inc., 981 F.2d 443, 446 (9th Cir. 1992); fees may
14 even be awarded where the removal was fairly supportable and yet
15 wrong as a matter of law. Balcorta v. Twentieth Century-Fox Film
16 Corp., 208 F.3d 1102, 1108 (9th Cir. 2000). Such an award will be
17 reversed only if it was based on a clearly erroneous finding of
18 fact, or if the district court wrongly determined that the case
19 should be remanded to state court. Id. at 1105. The Court, in its
20 discretion, makes an equitable determination whether plaintiffs
21 should be forced to bear their own costs or whether costs should
22 be shifted to the defendant; any attorney's fees awarded must be
23 reasonable. See Braco v. MCI Worldcom Communications, Inc., 138
24 F.Supp.2d 1260, 1270 (C.D.Cal. 2001). The term "just costs"
25 includes fees incurred in bringing the motion to remand and is
26 limited to costs that were incurred in federal court that would
27 not have been incurred had the case remained in state court.
28 Tenner v. Zurek, 168 F.3d 329, 330 (7th Cir. 1998).

1 Here, Plaintiffs' counsel, John G. Michael, declared under
2 penalty of perjury that his normal hourly rate is \$285.00, and
3 that this rate is reasonable and customary in the community given
4 his level of experience and expertise. He spent 11.2 hours
5 researching, analyzing, and reviewing Defendants' removal
6 documents, pleadings, and motion for interpleader and joinder of
7 parties to the related case, as well as preparing the motion for
8 remand and for sanctions, including the supporting papers. He
9 spent 3.1 hours reviewing and analyzing Defendants' opposition to
10 the motion to remand and preparing the reply papers. He
11 anticipates spending two more hours preparing for and attending
12 the hearing, for a total of 16.3 hours on the motion.

13 Given the lack of a showing of an arguable basis of
14 jurisdiction, the Court concludes that Plaintiff should not be
15 forced to bear their own costs. The hourly rate and hours claimed
16 by counsel for the tasks described are reasonable. The Court
17 concludes that fees should be awarded for 14.3 hours because no
18 time will be spent on preparation for and attendance at the
19 hearing. Accordingly, the reasonable amount of attorney's fees to
20 be awarded is \$4,075.50.

21 V. Recommendation

22 Accordingly, it IS RECOMMENDED that

23 1. Plaintiffs' motion to remand the action to the Madera
24 County Superior Court BE GRANTED; and

25 2. Plaintiffs' motion for attorney's fees in the amount of
26 \$4,075.50 BE GRANTED; and

27 3. The action BE ORDERED remanded to the Superior Court for
28 the County of Madera.

1 This report and recommendation is submitted to the United
2 States District Court Judge assigned to the case, pursuant to the
3 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 72-304 of the
4 Local Rules of Practice for the United States District Court,
5 Eastern District of California. Within thirty (30) days after
6 being served with a copy, any party may file written objections
7 with the Court and serve a copy on all parties. Such a document
8 should be captioned "Objections to Magistrate Judge's Findings
9 and Recommendations." Replies to the objections shall be served
10 and filed within ten (10) court days (plus three days if served
11 by mail) after service of the objections. The Court will then
12 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
13 (b) (1) (C). The parties are advised that failure to file
14 objections within the specified time may waive the right to
15 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
16 1153 (9th Cir. 1991).

17
18 IT IS SO ORDERED.

19 **Dated: August 11, 2005**
icido3

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE